Jub'il bin Mohamed Taib Taral & Ors v Sunway Lagoon Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S9(S4)–23–72 OF 1998
TEE AH SING J
8 AUGUST 2001

Civil Law Act *— Damages — Fatal accident — Dependency claim — Whether deductions had to be made for contingencies, other vicissitudes of life and accelerated payment in determining multiplier — Calculation of multiplicand — Whether bonus to be included in computation of deceased's monthly salary — Civil Law Act 1956 s 7*

Damages (Personal Injury or Death) *— Action for — Loss of dependency — Whether deductions had to be made for contingencies, other vicissitudes of life and accelerated payment in determining multiplier — Calculation of multiplicand — Whether bonus to be included in computation of deceased's monthly salary — Civil Law Act 1956 s 7*

Damages (Personal Injury or Death) *— Fatal accident — Dependency claim — Whether deductions had to be made for contingencies, other vicissitudes of life and accelerated payment in determining multiplier — Calculation of multiplicand — Whether bonus to be included in computation of deceased's monthly salary — Civil Law Act 1956 s 7*

Damages (Personal Injury or Death) *— General damages — Assessment — Claim for expenses to buy food and drinks — Tuition fees and Al-Quran classes — Laundry expenses — Child-minding expenses — Damages for nervous shock — Bereavement*

Damages (Personal Injury or Death) *— Special damages — Death due to accident — Claim for costs of fresh milk that plaintiff consumed to overcome difficulty in sleeping — Whether supported by medical evidence — Claim for costs of mineral water for sprinkling deceased's grave — Whether use of mineral water required under Muslim law — Claim for travelling expenses for seeking specialist medical treatment — Funeral expenses*

Tort *— Negligence — Nervous shock — Plaintiff witnessed accident and death of deceased — Chronic post traumatic stress disorder — Determination of liability in respect of nervous shock — Test established in* Mcloughlin v O'Brien *— Close relationship — Proximity of tortious event — Means by which the shock was caused*

This was a claim brought by the plaintiffs for loss of dependency under s 7 of the Civil Law Act 1956 ('the Act') and for other general and special damages against the defendant. The deceased died as a result of injuries sustained after she had fallen off a train at the defendant's theme park. The first plaintiff ('SP1') was the deceased husband and the second and third plaintiffs were her children, aged eight and five years of age at the time of her death. The deceased was 29 years old when she died. Prior to her death, she worked as a clerk with Bank Simpanan Nasional and drew a basic salary of RM1,140 per month. The deceased had received teller allowance, overtime and 'pelarasan gaji' amounting to RM70, RM100 and RM150 per month

respectively ('the allowances'). The deceased's minimum bonus was equivalent to one month's pay. According to SP1, the deceased had contributed a sum of RM780 to the family, which consisted of child care for the children, fares for the children's school bus, children's clothings and savings with Lembaga Tabung Haji for the children. The defendant did not contest the issue of liability and the issue for the court to deal with was in respect of the quantum of damages that the plaintiffs were entitled to. In respect of general damages, the plaintiffs claimed: (a) additional expenses to buy food and drinks; (b) expenses for the children's tuition fees and Al-Quran classes; (c) laundry expenses; (d) expenses for looking after the two children; (e) damages for nervous shock suffered by SP1 and the second plaintiff; and (f) bereavement. According to a psychiatric specialist, after the deceased's death, SP1 suffered from chronic post traumatic stress disorder for a period of six months. As for special damages, the plaintiffs claimed: (a) the costs of fresh milk amounting to RM2,376 that SP1 had to consume over a period of two years to overcome his difficulty in sleeping; (b) the costs of mineral water amounting to RM422.40 for use in sprinkling the deceased's grave; (c) the costs of flowers at RM40 per month for putting on the deceased's grave; (d) travelling expenses of RM20 per month for fortnightly visits to the deceased's grave; (e) travelling expenses of RM195 for seeking specialist medical treatment; (f) funeral expenses of RM5,000; and (g) RM20 for the death certificate, RM80 for the post mortem report and RM5 for the police report.

Held:

(1) The deceased was 29 years old at the time of death and pursuant to s 7 of the Act, the number of years of purchase was 16 years. Based on the authority of *Chan Chin Ming & Anor v Lim Yoke Eng* [1994] 3 MLJ 233, deductions had to be made for contingencies, other vicissitudes of life and accelerated payment. Further, there was the possibility of SP1 remarrying, despite his present firm disinclination to do so. Accordingly, the most appropriate number of years purchase was 10 years and not 16 years (see pp 680A, H–681A).

(2) Although the deceased had received bonus equivalent to at least one month's salary in the past, bonus was prospective and speculative and therefore should not be taken into account in the computation of the deceased's monthly salary. Accordingly, the deceased's monthly salary was calculated at RM1,460, which comprised of the basic salary and the allowances. After deducting the sum of RM692.21 as stated in the statement of last drawn salary, the deceased's take home pay amounted to RM768 (rounded up from RM767.79). As the deceased's take home pay was only RM768 per month, SP1's argument that the deceased had contributed RM780 to the family was not accepted. After deducting the deceased's monthly living expenses of RM150 from

the take home pay, the multiplicand arrived at was RM620 (rounded up from RM618). Accordingly, the loss of dependency was RM620 per month and the total loss of dependency was RM620 per month x 10 x 12 months or RM74,440 (see pp 682G–H, 683B–D).

(3) The second and third plaintiffs had lost their mother's love and since such a loss could not be assessed in monetary terms, it could not support a claim for damages. Therefore, the second and third plaintiffs' claim of RM20,000 for loss of love and affection was disallowed. Although damages could not be recovered for the loss of their mother's love, they could be recovered for the loss of those services capable of being valued in terms of money which the deceased would have rendered to them as their mother had she survived (see p 683D–E).

(4) The claim of additional expenses to buy food and drinks at RM500 per month was disallowed because it was not part of the services of the deceased as a wife and mother. What SP1 should have done was to employ a cook or a housekeeper to cook food and prepare drinks on a monthly basis and if the amount paid to the cook or housekeeper was reasonable, this sum could then be claimed because the deceased would have performed the service of cooking and preparing drinks if she were still alive (see p 684G–H).

(5) The defendant did not challenge SP1's evidence that he had to incur expenses of RM150 and RM80 per month for the children's tuition fees and Al-Quran classes respectively and that prior to the deceased's death, she had tutored and taught the Quran to the two children. However, even if the deceased were alive she would not have been able to give the children proper tuition when they reach secondary school. As such, the multiplier should be six years for the children's primary school years. As such, RM10,800 was awarded for the tuition fees. In respect of the Al-Quran classes, the plaintiffs had asked for a multiplier of six years and accordingly a sum of RM5,760 was awarded to the plaintiffs (see p 685D–F).

(6) The plaintiffs' laundry was done by the deceased prior to her death. After her death, SP1 spent RM40 per month on the laundry expenses. Taking into consideration that there was a possibility that SP1 might remarry, a multiplier of eight years was appropriate. Therefore, a sum of RM3,840 (RM40 per month x 8 x 12 months) was awarded for laundry expenses (see p 685F–G).

(7) The defendant did not challenge the testimonies of SP1 and the child-minder regarding the amount paid by SP1 for the child-minding services. As there was a likelihood that SP1 might remarry, an appropriate multiplier was eight years. Accordingly, in respect of the claim for expenses for looking after children, the

plaintiffs were awarded RM19,200 (RM200 per month x 8 x 12 months) (see p 686D–E).

(8) The costs of the flowers and travelling to the deceased's grave could not be claimed because the flowers were placed by SP1 on his own volition as Muslim law did not make it obligatory to do. Furthermore, the costs of the flowers and travelling to the deceased's grave came under the claim for bereavement. Travelling expenses incurred by SP1 for seeking specialist medical treatment was however allowed (see pp 692I–693B).

(9) The test established in *McLoughlin v O'Brien* [1983] 1 AC 410 for determination of liability in respect of nervous shock centred on the requirements of a close relationship, proximity of a tortious event and the means by which the shock was caused. In the instant case, the requirement of a close relationship had been satisfied as SP1 and the deceased were husband and wife. In regard to the other requirements, SP1 was seated next to the deceased on the runaway train and witnessed how the deceased was flung out of the train and fell to the ground. SP1 saw the injuries sustained by deceased due to the fall (see pp 686I–687A).

(10) Based on evidence of the psychiatric specialists, it was clear that SP1 had fully recovered and was not suffering from any psychological illness at present and SP1 was able to perform his work properly. As such, a sum of RM5,000 was awarded in respect of the chronic post traumatic stress disorder suffered by SP1 from 20 November 1997 till 21 May 1998 (see p 690D–E).

(11) In respect of the second plaintiff's claim for nervous shock, the counsellor at the Public Services Department ('SP5') who had attended to the second plaintiff was not an expert in child psychology as she did not have a medical degree. The evidence of SP5 and the contents of her reports did not show that the second plaintiff was suffering from any psychiatric illness and therefore, his claim for nervous shock was disallowed (see p 691B–C).

(12) P1 was entitled to claim as damages for bereavement of RM10,000 pursuant to s 7(3A) read with s 7(3B)(a) of the Act (see p 691D).

(13) There was no medical evidence to show that it was necessary for SP1 to consume fresh milk to overcome his difficulty in sleeping. The usage of mineral water was done on SP1's own volition as Muslim law did not make it obligatory to do so. Therefore, the claims for the costs of fresh milk and mineral water were disallowed (see p 692A–E).

(14) P1 did not furnish any particulars on how he had spent RM5,000 as funeral expenses. Since the defendant's counsel had conceded that a sum of RM2,000 was reasonable for funeral expenses, a sum of RM2,000 was awarded as funeral expenses despite the lack

of proof in support of the claim. Similarly, the amounts claimed for the death certificate, post mortem report and police report were awarded although no receipts were produced by the plaintiffs (see p 694A–D).

[**Bahasa Malaysia summary**

Ini adalah tuntutan yang dimulakan oleh plaintif-plaintif untuk kehilangan penanggung di bawah s 7 Akta Undang-Undang Sivil 1956 ('Akta tersebut') dan untuk ganti rugi am dan khas terhadap defendan. Si mati telah meninggal dunia akibat daripada kecederaan yang dialami setelah beliau jatuh daripada tren di taman rekreasi bertema defendan. Plaintif pertama ('SP1') adalah suami si mati dan plaintif-plaintif kedua dan ketiga adalah anak-anaknya, berumur lapan dan lima tahun semasa kematiannya. Si mati berumur 29 tahun semasa meninggal dunia. Sebelum kematian beliau, beliau bekerja sebagai kerani dengan Bank Simpanan Nasional dan membawa pulang gaji pokok RM1,140 sebulan. Si mati menerima elaun juruwang, kerja lebih masa dan pelarasan gaji masing-masing berjumlah RM70, RM100 dan RM150 sebulan ('elaun-elaun tersebut'). Bonus minimum si mati sama dengan bayaran satu bulan gaji. Menurut SP1, si mati telah menyumbang sejumlah RM780 kepada keluarga, yang terdiri daripada penjagaan anak-anak, tambang bus sekolah anak-anak, pakaian anak-anak dan simpanan di Tabung Haji untuk anak-anak. Defendan tidak mencabar persoalan liabiliti dan persoalan untuk dikendalikan oleh mahkamah adalah berhubung kuantum ganti rugi yang berhak diperolehi plaintif-plaintif. Berhubung ganti rugi am, plaintif-plaintif telah menuntut untuk: (a) perbelanjaan tambahan untuk membeli makanan dan minuman; (b) perbelanjaan untuk yuran tusyen dan kelas Quran; (c) perbelanjaan dobi; (d) perbelanjaan menjaga kedua-dua anak-anak; (e) ganti rugi untuk kejutan saraf yang dialami oleh SP1 dan plaintif kedua; dan (f) kematian isteri. Menururt pakar psikiatrik, selepas kematian si mati, SP1 mengalami gangguan tekanan kronik akibat kejadian traumatik untuk tempoh enam bulan. Untuk ganti rugi khas, plaintif-plaintif menuntut: (a) kos susu segar berjumlah RM2,376 yang SP1 perlu ambil selama tempoh dua tahun untuk mengatasi masalah tidur beliau; (b) kos air mineral berjumlah RM422.40 untuk kegunaan merenjis ke atas kubur si mati; (c) kos bunga berjumlah RM40 sebulan untuk diletakkan ke atas kubur si mati; (d) perbelanjaan perjalanan berjumlah RM20 sebulan untuk menziarah kubur si mati setiap dua minggu; (e) perbelanjaan perjalanan berjumlah RM195 untuk mendapatkan rawatan pakar perubatan; (f) perbelanjaan pengebumian; dan (g) RM20 untuk sijil kematian, RM80 untuk laporan pos mortem dan RM5 untuk laporan polis.

Diputuskan:

(1) Si mati berumur 29 tahun semasa kematian dan menurut s 7 Akta tersebut, jumlah tahun perolehan adalah 16 tahun. Berdasarkan

autoriti *Chan Chin Ming & Anor v Lim Yoke Eng* [1994] 3 MLJ 233, potongan mesti dibuat untuk kontingensi, jatuh bangun dalam hidup yang lain dan bayaran awal. Tambahan pula, terdapat kemungkinan SP1 berkahwin semula, walaupun sekarang beliau dengan tegas rasa keberatan untuk berbuat demikian. Sewajarnya, jumlah tahun perolehan adalah sepuluh tahun dan bukan 16 tahun (lihat ms 680A, H–681A).

(2) Walaupun si mati telah menerima bonus sama dengan lebih kurang gaji sebulan sebelum ini, bonus adalah dijangka dan spekulatif dan oleh itu tidak sepatutnya diambilkira dalam pengiraan gaji bulanan si mati. Sewajarnya, gaji bulanan si mati dikira berjumlah RM1,460, yang terdiri daripada gaji pokok dan elaun-elaun tersebut. Selepas memotong jumlah RM692.21 sebagai mana yang dinyatakan dalam penyata gaji terakhir, si mati telah membawa pulang gaji berjumlah RM768 (dibulatkan daripada RM767.79). Memandangkan si mati membawa pulang gaji hanya RM768 sebulan, hujah SP1 bahawa si mati telah menyumbang RM780 kepada keluarga tidak boleh diterima. Selepas memotong perbelanjaan sara hidup bulanan si mati berjumlah RM150 daripada gaji yang dibawa pulang, angka yang hendak didarab adalah RM620 sebulan dan jumlah kehilangan penanggung adalah RM620 sebulan x 10 x 12 bulan atau RM74,440 (lihat ms 682G–H, 683B–D).

(3) Plaintif-plaintif kedua dan ketiga telah kehilangan kasih sayang ibu dan memandangkan kehilangan sedemikian tidak boleh dinilai dengan wang ringgit, ia tidak boleh menyokong tuntutan untuk ganti rugi. Oleh itu, tuntutan plaintif-plaintif kedua dan ketiga berjumlah RM20,000 kerana kehilangan kasih sayang tidak dibenarkan. Walaupun ganti rugi tidak boleh diperolehi untuk kehilangan kasih sayang ibu, mereka boleh mendapatkannya untuk kehilangan khidmat yang boleh dinilaikan dalam bentuk wang yang telah diberikan oleh si mati kepada mereka sebagai seorang ibu jika beliau masih hidup (lihat ms 683D–E).

(4) Tuntutan untuk perbelanjaan tambahan untuk membeli makanan dan minuman berjumlah RM500 sebulan tidak dibenarkan kerana ia bukan sebahagian daripada khidmat si mati sebagai seorang isteri dan ibu. Apa SP1 sepatutnya telah lakukan adalah untuk menggajikan seorang tukang masak atau pembantu rumah untuk memasak makanan dan menyediakan minuman secara bulanan dan jika jumlah yang dibayar kepada tukang masak atau pembantu rumah adalah munasabah, jumlah ini mungkin boleh dituntut kerana si mati mungkin akan melaksanakan khidmat memasak dan menyediakan minuman jika beliau masih hidup (lihat ms 684G–H).

(5) Defendan tidak mencabar keterangan SP1 bahawa beliau telah membelanjakan masing-masing RM150 dan RM80 sebulan untuk yuran tusyen dan kelas Al-Quran anak-anak dan bahawa

sebelum kematian si mati, beliau telah melatih dan mengajar kedua-dua orang anaknya Quran. Namun begitu, walaupun jika si mati masih hidup, beliau tidak mungkin memberikan anak-anak tusyen dengan sempurna apabila mereka masuk ke sekolah menengah. Oleh itu, pendarab sepatutnya enam tahun untuk persekolahan rendah anak-anak tersebut. Berhubung dengan kelas Al-Quran, plaintif-plaintif telah meminta pendarab untuk enam tahun dan sewajarnya sejumlah RM5,760 diawardkan kepada plaintif-plaintif (lihat ms 685D–F).

(6) Dobi plaintif-plaintif telah dilakukan oleh si mati sebelum kematian beliau. Selepas kematian beliau, SP1 telah menghabiskan RM40 sebulan untuk perbelanjaan dobi. Dengan mengambilkira bahawa ada kemungkinan SP1 mungkin akan berkahwin semula, pendarab yang sesuai adalah lapan tahun. Sewajarnya, berhubung tuntutan untuk perbelanjaan dobi, jumlah RM3,840 (RM40 sebulan x 8 x 12 bulan) telah diberi (lihat ms 685F–G).

(7) Defendan tidak mencabar keterangan SP1 dan penjaga anak-anak tersebut berhubung jumlah yang dibayar oleh SP1 untuk khdimat penjagaan anak tersebut. Memandangkan terdapat kemungkinan bahawa SP1 mungkin akan berkahwin semula, pendarab yang sesuai adalah lapan tahun. Sewajarnya, berhubung tuntutan untuk perbelanjaan menjaga anak-anak, plaintif-plaintif telah diawardkan RM19,200 (RM200 sebulan x 8 x 12 bulan) (lihat ms 686D–E).

(8) Kos bunga dan perjalanan untuk ke kubur si mati tidak boleh dituntut kerana bunga yang diletakkan oleh SP1 adalah atas kerelaan beliau sendiri kerana undang-undang Islam tidak menjadikannya wajib berbuat demikian. Tambahan pula, kos bunga dan perjalanan untuk ke kubur si mati adalah di bawah tuntutan untuk kehilangan. Perbelanjaan perjalanan yang dialami oleh SP1 kerana mendapatkan rawatan pakar perubatan bagaimanapun dibenarkan (lihat ms 692I–693B).

(9) Ujian yang ditentukan dalam *McLoughlin v O'Brien* [1983] 1 AC 410 berhubung liabiliti tentang kejutan saraf berkisar mengenai keperluan satu perhubungan rapat, kaitan kedekatan kejadian tort dan sumber kejutan tersebut berlaku. Di dalam kes sekarang, keperluan satu perhubungan rapat telah dipenuhi kerana SP1 dan si mati adalah suami isteri. Berhubung dengan keperluan lain, SP1 telah duduk di sebelah si mati atas tren dan menyaksikan bagaimana si mati tercampak keluar tren tersebut dan jatuh ke tanah. SP1 melihat kecederaan yang dialami oleh si mati disebabkan jatuh tersebut (lihat ms 686I–687A).

(10) Berdasarkan keterangan pakar psikiatrik, adalah jelas bahawa SP1 telah pulih sepenuhnya dan tidak mengalami apa-apa gangguan psikologi sekarang dan SP1 mampu melaksanakan kerja beliau dengan betul. Oleh itu, jumlah RM5,000 diawardkan berhubung

gangguan tekanan kronik akibat kejadian traumatik yang dialami oleh SP1 daripada 20 November 1997 hingga 21 Mei 1998 (lihat ms 690D–E).

(11) Berhubung tuntutan plaintif kedua terhadap kejutan saraf, kaunselor di Jabatan Perkhidmatan Awam ('SP5') yang telah merawat plaintif kedua bukan pakar dalam psikologi kanak-kanak kerana beliau tidak mempunyai sarjana muda perubatan. Keterangan SP5 dan kandungan laporan beliau tidak menunjukkan bahawa plaintif kedua mengalami apa-apa gangguan psikiatrik dan oleh itu, tuntutan beliau untuk kejutan saraf tidak dibenarkan (lihat ms 691B–C).

(12) SP1 berhak untuk menuntut ganti rugi kehilangan sebanyak RM10,000 menurut s 7(3A) dibaca bersama s 7(3B)(a) Akta tersebut (lihat ms 691D).

(13) Tiada keterangan perubatan untuk menunjukkan bahawa adalah perlu untuk SP1 minum susu segar bagi mengatasi masalah beliau untuk tidur. Kegunaan air mineral telah dilakukan atas kerelaan beliau sendiri kerana undang-undang Islam tidak menjadikan ia wajib berbuat demikian. Oleh itu, tuntutan-tuntutan untuk kos susu segar dan air mineral tidak dibenarkan (lihat ms 692A–E).

(14) SP1 tidak mengemukakan apa-apa butiran tentang bagaimana beliau telah membelanjakan RM5,000 untuk perbelanjaan pengebumian. Memandangkan peguam defendan telah bersetuju bahawa sejumlah RM2,000 adalah munasabah untuk perbelanjaan pengebumian, sejumlah RM2,000 diawardkan untuk perbelanjaan pengebumian kerana bukti yang tidak mencukupi untuk menyokong tuntutan tersebut. Begitu juga, jumlah yang dituntut untuk sijil kematian, laporan pos mortem dan laporan polis telah diawardkan walaupun tiada resit-resit dikemukakan oleh plaintif-plaintif (lihat ms 694A–D).]

Notes

For cases on fatal accidents, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2655–2688 and 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 249.

For cases on dependency claim in fatal accident, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 299–310.

For a case on assessment of general damages, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 385.

For cases on special damages, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1450–1451.

For cases on nervous shock, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 775–777.

Cases referred to

Chan Chin Ming & Anor v Lim Yoke Eng [1994] 3 MLJ 233 (folld)

McLoughlin v O'Brien [1983] 1 AC 410 (folld)

Neo Kim Soon (Administrator of the estate of Phanna Manneechuang, deceased) v Subramaniam a/l Ramanaidu & Anor [1995] 3 MLJ 435 (refd)
Ngooi Ku Siong & Anor v Aidi Abdullah [1985] 1 MLJ 30 (refd)
Pang Koi Fa v Lim Djoe Phing [1993] 3 SLR 317 (refd)
Rebecca Matthews & Ors v Sykt Kerjasama Serbaguna Gema Wong Siong Sdn Bhd & Anor [1990] 1 MLJ 443 (refd)
Takong Tabari v Government of Sarawak & Ors and another appeal [1998] 4 MLJ 512 (refd)
Yeap Ching Hock v Kaijima Tasei Venture [1973] 1 MLJ 230 (refd)
Zainab bte Ismail v Marimuthu & Anor [1955] 21 MLJ 22 (refd)

Legislation referred to

Civil Law Act 1956 ss 7(3)

Mohd Yaacob (*Azmer Md Saat* with him) (*Lianah Yaacob & Zulkepli*) for the plaintiffs.
David Lingam (*David Lingam & Co*) for the defendant.

Tee Ah Sing J:. At the commencement of trial on 21 November 2000, the learned counsel for the defendant informed the court that the defendant is not contesting the issue of liability. And in that regard, they are offering no evidence on that issue. The learned counsel for the defendant stated that there is no strict admission of liability on their part. As liability is not contested, the only issue for the court to deal is on the quantum of damages the plaintiffs are entitled to.

This is a claim by Jub'il bin Mohamed Taib Taral, first plaintiff, who is the husband of Siti Arfah bte Sheikh Md Dom ('the deceased') for himself and his two infant children, namely Mohamad Ashraf Shub'li bin Jub'il ('the second plaintiff') and Sofea Balquis bte Jub'il ('the third plaintiff') under s 7 of the Civil Law Act 1956 ('the Act'), together with special damages against the defendant. The claim under s 7 of the Act is for loss of dependency and is for the benefit of the husband and the two children.

The first plaintiff ('SP1') has testified that he is the husband of the deceased and they have two children from the marriage, namely the second plaintiff aged eight years old and the third plaintiff aged five years old at the time of the death of the deceased.

He testified that the deceased was born on 27 March 1968 and at the time of her death on 20 November 1997, the deceased was 29 years old. Before his wife's death, she was working as a clerk in the Bank Simpanan Nasional branch at Pudu Raya. Her monthly basic pay was RM1,140. She received Teller Allowance of RM70 per month and overtime about RM100 per month. She also received 'pelarasan gaji RM150 sebulan dan juga bonus minimum sebulan gaji.' SP1 confirmed that P3 is the 'penyata bayaran gaji terakhir si mati' and the details in P3 are correct.

The 'penyata saraan daripada penggajian' for 1997 in respect of the deceased's income was tendered as P4.

SP1 further testified as follows:

S: Boleh beritahu mahkamah apa kehilangan kamu dan anak-anak kamu dari pendapatan simati?

J: Bayaran jagaan anak-anak sebanyak RM500 sebulan, tambang bas sekolah RM150 sebulan dan pakaian anak-anak RM100 sebulan.

S: Adakah apa-apa simpanan untuk anak-anak kamu oleh simati?

J: Ada. Iaitu Tabung Haji RM30 sebulan.

S: Akibat dari kematian isteri kamu adakah kamu alami perbelanjaan lain?

J: Ada. Perbelanjaan makan dan minum yang dibeli di kedai makan sebanyak RM500 sebulan. Tuition anak-anak sebanyak RM150 sebulan. Yang ketiga kelas Al-Quran RM80 sebulan. Pakaian Dobi RM40 sebulan.

S: Adakah perbelanjaan-perbelanjaan ini kamu tidak alami sebelum kematian isteri kamu?

J: Untuk makan dan minum isteri saya memasak sendiri. Pakaian digosok sendiri oleh isteri. Pelajaran dan Al-Quran diajar sendiri oleh isteri.

S: Adakah apa-apa belanja lain yang kamu terpaksa tanggung untuk anak-anak kerana kematian isteri kamu?

J: Saya memberi RM200 sebulan kepada kakak ipar untuk menjaga dan mendidik serta makan minum semasa ketiadaan saya untuk anak-anak saya.

In respect of special damages, SP1 testified in examination in chief as follows:

S: Selain daripada kerugian-kerugian itu, adakah kamu alami dan tuntut kerugian khas seperti dalam perenggan 19 penyata tuntutan (BP MS 11 ditunjukkan kepada saksi.)

J: Ya.

S: Boleh kamu beritahu mahkamah butir-butir tuntutan kamu?

J: Satu belanja pengkebumian RM5,000.

S: Boleh menjelaskan RM5,000 untuk apa?

J: Kenduri arwah sebanyak lebih kurang 10 kali dan juga kenduri yang dibawa ke masjid pada malam jumaat sekurang-kurangnya sekali sebulan.

S: Selain dari itu apakah yang kamu tuntut?

J: (2) Kos membuat sijil mati RM20; (3) Laporan bedah siasat RM80; (4) Laporan Polis RM5; (5) Perjalanan rawatan pakar pada kadar RM50 setiap lawatan sebanyak lebih kurang 10 kali; (6) Kos susu segar untuk mengatasi kesukaran tidur RM99 sebulan selama 2 tahun; (7) Kos Bunga semasa mengziarahi kubur RM40 sebulan sejak kematian dan masih berterusan; (8) Kos air mineral RM17.60 sebulan sejak kematian dan masih berterusan; (9) Perbelanjaan ziarah kubur RM20 sebulan sejak kematian dan masih berterusan.

S: Berapa kali kamu ziarah kubur isteri kamu dalam sebulan?

J: Dua kali seminggu, iaitu pada hari Jumaat dan hari cuti samada hari Sabtu atau hari Ahad.

SP1 was asked in cross examination whether he could confirm that the claims in p 15(b) of the statement of claim are correct and true. And he answered 'Perenggan 15(b) bahagian (iii) dan (iv) telah saya masukkan sebagai perbelanjaan tambahan semasa saya beri keterangan pada pagi tadi. Yang lain-lain (i), (ii), (v) dan (vi) adalah betul dan benar.' Later on he said 'Item (iii) dan (iv) sememangnya tidak dikeluarkan oleh si mati.'

He was further cross examined as follows:

S: Patutnya dua item (iii) dan (iv) sepatutnya mestilah ditolak dari jumlah?

J: Saya bersetuju item (iii) dan (iv) ditolak daripada jumlah sumbangan oleh si mati.

S: Kira mengikut perkataan En Jub'il jumlah baru ialah RM780, betul?

J: Betul.

SP 1 was further crossed examined as follows:

S: Adakah si mati belanja duit sendiri untuk diri sendiri?

J: Ya.

S: Bolehkah saya menyatakan perbelanjaan sebulan ikut semua sebagai pakaian, toiletry, make up, kasut, beg, makan tengahari, sarapan pagi, membelanja kawan makan satu bulan beliau belanjakan RM150 hingga RM200?

J: Saya tidak bersetuju dengan cadangan oleh peguam.

S: Berapa kamu anggap beliau belanja sebulan atas diri sendiri?

J: Saya tidak dapat memberi jawapan.

S: Bolehkah kamu agak-agak?

J: Saya tidak dapat agak-agak kerana saya tidak pernah mengambil tahu perbelanjaan hariannya.

S: Tetapi kamu bersetuju ada perbelanjaan hari-hari sendiri tetapi berapa kamu tidak tahu?

J: Ya.

In cross examination, SP1 was asked as follows:

S: Adakah rancangan keinginan untuk berkahwin lagi?

J: Belum ada jodoh.

S: Adakah kamu ada keinginan untuk berkahwin semula?

J: Buat ketika ini, saya ingin menumpukan sepenuhnya terhadap kes ini dan membesarkan anak-anak.

S: Langsung kamu tidak ingin berkahwin lagi sehingga mati?

J: Sebagai seorang Islam, saya percaya jodoh dan maut ditentukan oleh Tuhan.

S: Dalam agama Islam tidak ada halangan untuk berkahwin lagi?

J: Ya.

The first plaintiff gave evidence to state that he is the husband of the deceased and that they have two children from the marriage, namely, the second and third plaintiffs.

So the claim under s 7 of the Act is for loss of dependency and is for the benefit of the widower and the two children. It is not disputed that at the time of her death the deceased was 29 years old.

Under s 7(3)(iv)(d) of the Act, the number of years purchase is 16 years.

In the case of *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512, her Ladyship Siti Norma Yaakob JCA (delivering the judgment of the Court of Appeal) at pp 522–523 said:

> As we have stated earlier, the widow's appeal is two fold:
>
> (1) The $^1/_3$ deduction of RM90,000 against the total award for loss of dependency, the objection being the right to deduct but not the amount deducted; and
>
> (2) The liability to pay Liew's costs.
>
> For the loss of dependency, the learned trial judge had on the formula provided by s 7(3)(iv)(d) of the Act calculated the deceased's loss of earnings on the multiplier of nine years purchase and a multiplicand of RM2,500 per month after all the allowable deductions were made. These two figures are not disputed and a total sum of RM270,000 was reached as general damages for loss of dependency. The learned trial judge did not stop there but went on to deduct a sum of RM90,000 equivalent to $^1/_3$ from the total sum calculated, thereby leaving a balance of RM180,000 payable. Apart from stating that the $^1/_3$ deduction was for contingencies, other vicissitudes of life and accelerated payment, he did not identify what such deduction related to.
>
> It is the widow's contention that such a deduction is contrary to law as by the introduction of proviso (d) to s 7(3)(iv) of the Act on 1 October 1984, the discretion to deduct a sum for contingencies, other vicissitudes of life and accelerated payment at common law is now no longer available and with the replacement of that common law practice, there is already a built-in deduction in the statutory formula itself and a further deduction as was done in this case was not proper. She contends that the estate is entitled to be paid the total sum of RM270,000 for her claim for loss of dependency. For this contention, she relies on the minority decision of the Supreme court in the case of *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233.
>
> As a court that is inferior to the Supreme Court, we are bound by the principle of stare decisis to accept the majority decision on *Chan*'s case. That majority judgment states that as a matter of interpretation, if Parliament had intended to depart from the general system of law, it would express its intention with irresistible clearness. Since it found such clearness missing in proviso (d), the common law practice of making deductions for contingencies, other vicissitudes of life and accelerated payment continues to be in force. Under such circumstances and in reliance of the majority decision in *Chan*'s case, we found that the learned trial judge made no error of law when he made the deduction and reduced the claim for loss of dependency to RM280,000.

So, on the authority of *Chan Chin Ming & Anor v Lim Yok Eng* (the majority decision), I have to make deductions for contingencies, other vicissitudes of life and accelerated payment. Further, I have to take into account the possibility of the first plaintiff remarrying despite his present firm

disinclination so to do. I am of the view that the most appropriate number of years purchase is ten years and not 16 years. So, in this case, I award the number of years purchase as ten years.

P4 shows the total yearly income of the deceased inclusive of bonus, amounting to RM15,324.19. So, the average monthly income of the deceased is RM1,277.02 (RM15,324.19 divided by 12 months equal RM1,277.02). So, the learned counsel for the plaintiffs submitted that this average monthly income of RM1,277 should be used, and from this amount, to deduct the amount for the deceased's personal living expenses and the remainder is the value of dependency for the plaintiffs. In support, the case of *Rebecca Mathew & Ors v Syarikat Kerjasama Serbaguna Gema Wong Siong Bhd & Anor* [1990] 1 MLJ 443 was cited. At p 443, his Lordship KC Vohrah J (as he then was) said:

> With respect, in the circumstances of this case, I think the more sensible approach is the one advanced by counsel for the defendants; find the net income of the deceased and deduct from that a percentage representing the deceased's personal living expenses; the remainder is the value of the dependency for the plaintiffs.

And at p 444, his Lordship said:

> His gross earnings for 1981 as shown in the employer's return of income of the deceased to the Tax Department (the 1981 EA Form) came to RM40,914.04. From this must be deducted the income tax he had to pay on his earnings and it was agreed that he probably paid RM7,790 as tax. From the remainder of RM33,124.04 must then be deducted his Employees' Provident Fund contribution of RM3,871 (this appears in the 1981 EA Form) leaving a net income of RM29,253.04 for the year 1981. This works out to RM2,437.75 per month for 1981.
>
> In regard to 1982, the income from 1 January to 3 October 1982 (date of death of deceased), the employer's return of the deceased's income to the Tax Department (the 1982 EA Form) for the year 1982 showed a gross income of RM39,391.75. Probable income tax that was paid has been agreed at RM4,307 and the Employees' Provident Fund contribution that was made by the deceased (shown in the 1982 EA Form) was RM3,871. Thus, the net income of the deceased for nine months in 1982 was RM31,213.75. This works out to RM3,468.19 per month.
>
> Averaging the income of the two years, there being nothing available for the court on which to determine the amount during the trial period, the net income is RM2,953 per month to the nearest dollar. There must be reduced from this amount of RM2,953 the personal living expenses of the deceased on the basis of what I had discussed earlier. Alex Mathew was a planter. Estate life is perhaps relatively quiet when compared to life in the urban area and personal expenses for a family man would probably not have been much. But he was a deputy manager of a big estate when he died and it is probable he had a fairly active social life where he would have had to incur personal expenses not required of other lower-ranking planters. It seems to me that, in the circumstances, a deduction of 25% from the net amount where the family comprised the husband, wife and two children seems appropriate and just. This would probably have covered his personal expenses (see the examples of personal expenditure mentioned in the Singapore case and in the cases cited

therein and also mentioned in the Brunei case of *Lita Maddox v Calito C Guinto & Anor* [1987] 2 MLJ 757.

There is no deduction for the cost of shared benefits such as housing and food, enjoyed as part of the family group. If this is an estate claim, I would have to make a deduction of a pro-rata share of the cost of shared benefits but this is a dependency claim and no deduction on that account should be made. Twenty-five per cent of the net amount is RM738 (to the nearest dollar). Thus, the surplus amount per month for the dependants is RM(2,953–738) which is RM2,215.

It is clear that the learned counsel for the plaintiffs had misconstrued the case cited. According to the case cited, to find the net income, the income tax and the Employee's Provident Fund contributions of the deceased should be deducted. The Employees' Provident Fund contribution of the deceased shown in P4 is RM1,570. From the total sum of RM15,324.07, the sum of Employees' Provident Fund contributions of RM1,570 should be deducted, leaving the sum of RM13,754.07. If this sum of RM13,754.07 is divided by 12 months, it comes to about RM1,146 per month.

In cross examination, SP1 was asked:

S: Tengok ID3. Pembayaran cukai pendapatan tidak dimasukkan di ID3?

J: Betul.

S: Berapa cukai pendapatan si mati kena bayar?

J: Saya tidak ingat.

S: Pembayaran cukai pendapatan dibayar oleh si mati?

J: Ya.

So, there is evidence that the deceased paid income tax but the amount of income tax paid is not stated by SP1. Thus, the court is not able to determine the total income tax paid by the deceased.

As such, I reject the contention of the plaintiff that the multiplicand should be RM1,277 per month.

I accept the evidence of SP1 that the deceased's monthly basis pay was RM1,140, teller allowance of RM70 per month, overtime about RM100 per month and pelarasan gaji RM150 per month. Although SP1 has stated that the deceased received bonus with at least a minimum of one month's salary, however, this bonus is prospective and speculative and therefore shall not be taken into account in the computation of the deceased's monthly income.

Therefore, her total monthly income for the above mentioned comes to RM1,460. In P3, only the deceased's basic pay of RM1,140 was stated and the other allowances were not mentioned. Therefore, from the sum of RM1,460 minus the deductions of RM692.21, as stated in P3, the deceased's take home pay was RM768 (RM767.79 rounded up to RM768) only.

According to the evidence of SP1, before the deceased's death, the deceased paid RM500 per month for taking care of the two children from her income, that she paid the school bus fare of RM150 per month for the

two children. SP1 also stated that the deceased spent RM100 per month on clothing for the children and that the deceased saved with Lembaga Tabung Haji RM30 per month for the children.

It is clear in cross examination, SP1 has admitted that the deceased did not pay the bayaran tuition anak-anak of RM150 per month and the bayaran kelas Al-Quran of RM80 per month. And SP1 agreed that these two items should be deducted from the dependency claim.

So, the deceased's monthly contribution to SP1 and the children would be RM780 and not RM1,010 as pleaded in para 15 of the statement of claim. As stated earlier, the deceased's take home pay per month was about RM768 only, so I do not accept that the deceased contributed RM780 per month for the family.

Further, a sum of RM150 should be deducted as living expenses of the deceased from her monthly income. Therefore, RM768 minus RM150 equals RM618. I am of the view that the multiplicand should be RM620 (RM618 round up to RM620).

Thus, I assess the loss of dependency at RM620 per month. The total loss of dependency is RM620 x 10 years x 12 months equals RM74,440. I shall next deal with the claim for general damages.

The second and third plaintiffs have lost the benefits and happiness it was to be expected they would derive as they grew up from the companionship of their mother. They have loss their mother's love. Their losses cannot be assessed in monetary terms and so cannot support a claim for damages. I disallow the claim of RM20,000 for loss of love and affection.

Although damages cannot be recovered for the loss of their mother's love, they can be recovered for the loss of those services capable of being valued in terms of money which she would have rendered to them as their mother had she survived.

In *Neo Kim Soon (Administrator of the estate of Phanna Manneechuang, deceased) v Subramaniam a/l Ramanaidu & Anor* [1995] 3 MLJ 435, the Court of Appeal has interpreted s 7(3)(ii) and (iii) clearly. His Lordship Mahadev Shankar JCA said:

> We need now to look at the new wording. Section 7(1) and (2) have not been altered. The old s 7(3) was deleted altogether. In its place, a new sub-s 7(3) was substituted. For the present, it is sufficient to set out the words of the subsection and proviso (ii) and (iii) which read as follows:
>
> > 'The damages which the party who shall be liable under sub-s (1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under sub-s (1):
> >
> > Provided that:
> > (ii) Damages may be awarded in respect of the funeral expenses of the person deceased if such expenses have been incurred by the party for whose benefit the action is brought;

(iii) no damages shall be awarded to a parent on the ground *only* of his having been deprived of the services of a child; and no damages shall be awarded to a husband on the ground only of his having been deprived of the services or society of his wife; (Emphasis added.)'

Here, the plaintiff was making the claim both for himself and for his son. He was not claiming for the equivalent monetary value of the services provided by the deceased, but the actual monetary expense he had paid to the housekeeper and would have to continue to pay the housekeeper to look after this boy of $11^1/_2$ years from the date of the accident.

We agree with Mr Chok Chin You of counsel for the plaintiff/appellant that what has been done away with by the proviso (iii) is an award of damages, in this case to the deceased's husband, only on the ground that he has been deprived of the services or society of his wife. So far, as a surviving husband is concerned, the proviso has abolished any award by way of general damages for loss of consortium. In other words, proof of the death of a wife, without more, will not entitle the surviving husband to an award in damages.

It is a different matter altogether where a husband has not only lost his wife, but has also been put to monetary loss which has been the direct result of the negligence. Such loss, in our view, continues to be recoverable.

SP1 has testified that as a consequence of the death of the deceased, he has incurred additional expenses. In examination in chief, his evidence was as follows:

S: Akibat dari kematian isteri kamu, adakah kamu alami perbelanjaan lain?

J: Ada. Perbelanjaan makan dan minum yang dibeli di kedai makan sebanyak RM500 sebulan. Tuition anak-anak sebanyak RM150 sebulan. Yang ketiga, kelas Al-Quran, RM80 sebulan. Pakaian dobi RM40 sebulan.

S: Adakah perbelanjaan-perbelanjaan ini kamu tidak alami sebelum kematian isteri kamu?

J: Untuk makan dan minum isteri saya memasak sendiri. Pakaian digosok sendiri oleh isteri. Pelajaran dan Al-Quran diajar sendiri oleh isteri.

S: Adakah apa-apa belanja lain yang kamu terpaksa tanggung untuk anak-anak kerana kematian isteri kamu?

J: Saya memberi RM200 sebulan kepada kakak ipar untuk menjaga dan mendidik serta makan minum semasa ketiadaan saya untuk anak-anak saya.

In respect of the claim of additional expenses incurred to buy food and drinks in the shop at RM500 per month, I disallow this claim. There is no basis for this because it is not part of the services of the deceased as a wife and mother. What SP1 should have done is to employ a cook or housekeeper to cook food and prepare drinks on a monthly basis. If the amount he paid to the cook or housekeeper is reasonable, then this sum can be claimed as the deceased would have performed the service of cooking and preparing drinks if she was still alive.

I am of the view that the claim for additional expenses incurred due to the death of the deceased for tuition fees for the children at RM150 per month; fee for kelas Al-Quran at RM80 per month; pakaian dobi at RM40

per month and payment of RM200 for taking care of the children comes under general damages and need not be specifically pleaded. The aforesaid claims come under para 18 of the statement of claim (BP10) which reads as follows:

> Plaintif kedua dan plaintif ketiga menuntut gantirugi dari defendan di atas kehilangan perkhidmatan, kasih sayang, pengajaran dan bimbingan yang diberikan sekiranya si mati masih hidup.

If the aforesaid claims can be substantiated by SP1 that he actually incurred them, then such claims are recoverable under s 7(3) of the Act (see *Neo Kim Soon (Administrator of the estate of Phanna Manneechuang, deceased) v Subramaniam a/l Ramanaidu & Anor*).

When SP1 gave evidence that as a consequence of the death of his wife, he had to incur expenses of RM150 per month for the tuition fees of the children and fee of RM80 per month for kelas Al-Quran. SP1 was not challenged at all in cross examination.

I accept the evidence of SP1 that when his wife was stilt alive, she gave tuition and taught Quran to the children. I also accept his evidence that he spent RM150 on tuition fees and RM80 on Quran classes per month. As the children grow and reach higher forms, I am of the view that the deceased, if she were alive, would not be able to give proper tuition to the children when they are in forms 1,2 or 3. As such, I am of the view that the multiplier should be six years when the children are still in primary school.

So, for the tuition fees at RM150 x 6 x 12 = RM10,800.

So, I award RM 10,800 for the tuition fees.

As for the expenses for kelas Al-Quran, the plaintiffs have asked for six years. So, for the fees for Al-Quran classes at RM80 x 6 x 12 = RM5,760. So, I award RM5,760 for the fees for the Al-Quran classes.

In respect of the laundry charges, I accept the evidence of SP1 that he spent RM40 on the laundry bill after the death of his wife. Before her death, the laundry was done by his wife, the deceased. Since the children are aged eight years and five years respectively, and taking into consideration that there is a possibility of SP1 getting married (although he stated his disinclination to do so) as he is still young, the most appropriate multiplier is eight years. So, RM40 x 8 x 12 = RM3,840. So, I award this sum of RM3,840 for laundry expenses.

I shall now deal with the claim for expenses for looking after the children.

SP1 has testified that since the death of his wife, he has to 'memberi RM200 sebulan kepada kakak ipar untuk menjaga dan mendidik serta makan minum semasa ketiadaan saya untuk anak-anak saya.' And in cross examination, SP1 was asked as follows:

> S: Dan sekarang kamu hanya membayar RM200 untuk kakak ipar menjaga anak?
>
> J: Ya.

Noormah bte Sheikh Md Dom (SP2) in examination in chief, testified

as follows:

S: Boleh kamu menjelaskan hubungan kamu dengan Jub'il bin Mohamed Taib Tarah?

J: Sebagai adik ipar.

S: Adakah selepas kematian si mati, Siti Arfah bte Sheikh Md Dom, kamu memberi khidmat menjaga dua anak En Jub'il?

J: Ya, ada.

S: Adakah kamu terima bayaran untuk perkhidmatan ini?

J: Ya, ada.

S: Berapa bayaran kamu terima setiap bulan?

J: RM200.

S: Sekarang ini pun kamu masih menjaga dua anak-anak itu?

J: Ya, saya masih menjaga mereka.

S: Adakah Pn Normah memberi apa-apa resit kepada En Jub'il.

J: Tidak ada.

There was no cross examination of SP2. Therefore, I accept the evidence of SP1 and SP2 that SP1 paid RM200 per month to SP2 to take care of his children. At the time of the death of the deceased on 20 November 1997, the second plaintiff was eight years old and the third plaintiff was five years old. And taking into consideration that there is a likelihood that SP1 would get married (although he has stated his disinclination to do so) as he is still young, the most appropriate multiplier is eight years.

So, for the cost of paying SP2 for taking care of the children, I award the plaintiff RM19,200 (RM200 x 8 x 12 = RM19,200).

I shall now deal with the claim for nervous shock for the first and second plaintiffs. The law as to 'nervous shock' has been considered very carefully and helpfully by the House of Lords in *McLoughlin v O'Brian* [1982] 2 All ER 298, [1983] 1 AC 410. In *Mcloughlin v O'Brian* [1983] 1 AC 410 at p 431, Lord Bridge said:

> The common law gives no damages for the emotional distress which any normal person experiences when someone he loves is killed or injured. Anxiety and depression are normal human emotions. Yet, an anxiety neurosis or a reactive depression may be recognisable psychiatric illnesses, with or without psychosomatic symptoms. So, the first hurdle which a plaintiff claiming damages of the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness.

In *Pang Koi Fa v Lim Djoe Phing* [1993] 3 SLR 317 held (2) at p 318 reads as follows:

> From the cases of *McLoughlin v O'Brian* [1983] 1 AC 410; [1982] 2 All ER 298 (folld) and *Alcock & Ors v Chief Constable of South Yorkshire Police* [1991] 4 All ER 907 (folld) the test established in English law for the determination of liability in respect of nervous shock cases centred on the requirement of a close relationship, proximity to a tortious event, and the means by which the

shock is caused (ie that it must come through sight or hearing of the event or of its immediate aftermath.). As regards the first requirement, the evidence showed not only the relationship of mother and child between the plaintiff and the deceased but the existence of a very close bond between them. The plaintiff therefore fell within the established class of persons whose claims have been recognized.

SP1 has testified that the day of incident, his wife, his two children and himself went to Sunway Lagoon Theme Park to enjoy themselves. While he and his wife were on the runaway train he say his wife fell and he heard his wife called out his name for the last time. He saw how the back of the head of the deceased was broken and smeared with blood. SP1 also testified that:

> Peristiwa ini telah menjadi igauan pada setiap kali saya ingin tidur. Setiap kali saya ingin tidur saya selalu terbayang bagaimana peritnya dan sukarnya beliau menghembuskan nafas terakhir. Di samping itu saya sering terdengar-dengar panggilan nama saya ketika beliau terjatuh. Disebabkan perkara ini saya mengalami sukaran tidur dan sering diganggu semasa tidur. Saya terpaksa mengambil pil tidor dan kadang-kadang saya tidak boleh tidur terus hingga ke pagi. Dengan itu prestasi kerja saya turut terganggu.

SP1 has also stated that he underwent psychiatric treatment and tests in Hospital Universiti Kebangsaan Malaysia, and also counselling under Dr Mat Saat Baki of Jabatan Perkhidmatan Awam, seven times from 21 May 1998 till 20 August 1998.

Dato' Dr Mat Saat Baki (SP4) confirmed that SP1 came to see him for treatment. SP4 confirmed that he issued the 'laporan kounseling' (exh P1D) and 'laporan ujian psikologi' (exh PIE). SP4 provided counselling services to SP1 in seven sessions. The test showed that SP1 was having nervous depression, socially inactive and withdrawn emotionally and passive.

Dr Osman Che Bakar (SP3) has testified that he is a medical doctor, and that since 1990, he became a Psychiatric Specialist. On 25 May 1998, he treated SP1. SP3 did prepare a medical report as in exh P2.

SP3 also testified as follows:

S: Apakah diagnosis penyakit yang dialami En Jub'il?

J: Mengikut diagnosis psikaitri, adalah Post Traumatic Stress Disorder.

S: Apakah rawatan yang diberikan oleh kamu kepda En Jub'il?

J: Rawatan yang diberikan adalah kombinasi antara rawatan ubat-ubatan dan kaunseling.

S: Dalam kes ini, beliau berjumpa doktor pada 25 Mei 1998 dan kematian isteri beliau pada 20 November 1997 lebih kurang enam bulan. Ada Post Traumatic Stress Disorder yang dialami beliau sesuatu yang biasa?

J: Dalam kes-kes Post Traumatic Stress Disorder boleh terbahagi kepada dua. Apa yang kita katakan acute dan kronic. Pada kes yang acute ianya tidak berlarutan lebih daripada tiga bulan. Pada kes yang kronik lebih daripada tiga bulan.

S: Dalam kes En Jub'il, pada pandangan kamu dalam kumpulan mana?

J: Dalam kumpulan kronic.

S: Apa punca penyakit ini pada pandangan kamu? A

J: Gangguan psikologi ini boleh berlaku pada sesiapa mengalami peristiwa yang tragik.

In respect of the requirements as stated in *McLoughlin v O'Brian*, in our case, the requirement of a close relationship has been satisfied. The evidence shows the relationship of husband and wife between the first B plaintiff and the deceased, and the existence of a very close bond between them. As regards the second and third requirements, the first plaintiff was sitting next to the deceased in the runaway train and he saw how the deceased was flung out of the runaway train and fell to the ground. He saw the back of the head of the deceased was broken and smeared with blood. C

As a result, the first plaintiff suffered from chronic post traumatic stress disorder from 20 November 1997 till 21 May 1998. I find that chronic post traumatic stress disorder is a form of psychiatric illness.

In deciding a figure for damages payable, reliable reliance to previous cases for comparison purposes should be made (see *Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30). D

SP1 is making a claim of RM500,000 for nervous shock for himself.

In the case of *Zainab bte Ismail v Marimuthu & Anor* [1955] MLJ 22, the learned judge Hill J awarded damages for nervous shock. At p 24, he said: E

> The doctor's evidence showed that the plaintiff is genuinely suffering from shock and she appeared to me to be still a sick woman nearly two years after the accident. I consider she is entitled to a substantial part of the amount she claims and I award the sum of RM5,000.

In *Zainab bte Ismail*, the plaintiff was still a sick woman nearly two years after the accident. F

In the case of *Pang Koi Fa v Lim Djoe Phing* [1993] 3 SLR 317, which is a case from Singapore, her Ladyship Amarjeet JC at p 320 said:

> The plaintiff's psychiatric illness arose from the trauma of being at her daughter's bedside throughout her suffering and the shock of her daughter's death. According to her psychiatrist, Dr Lim Hsin Loh ('Dr Lim'), the plaintiff felt very guilty about the operation and felt responsible for it. The sequence of events which contributed to the shock she experienced at her daughter's death were as follows. G

And at p 321 said:

H

> When her daughter died, the plaintiff was distraught. The plaintiff had watched her in severe pain and agony and upon her death, she was on the verge of a breakdown and almost committed suicide. In September 1985 she complained to Dr EA Heaslet of palpitations of the heart, breathlessness, insomnia, episodes of crying, loss of interest in her work and social life and pre-occupation with memories of her daughter. He treated her for a severe depression until January 1988. Her family observed that she had undergone a personality change. Her relationship with her son and husband were strained. She was constantly preoccupied with her daughter's death and preserved her I

daughter's desk at the office as well as her room at home.

Her son, PW6, testified that the plaintiff had undergone a personality change after the death of his sister. She stopped cooking for the family and became over protective of him, she reacted badly when she saw other families going out in groups, and she quarrelled frequently with her husband. Prior to her daughter's death, they had not quarrelled as much. She also went to Dr Tham's office and abused him, smashing some glass and banging some cupboards although she had ordinarily been a mild lady.

And at p 322 said:

The plaintiff's psychiatrist, Dr Lim, testified that she consulted him from January 1988 and another psychiatrist very briefly. He continued the treatment. He saw her often, sometimes every forthnight, sometimes monthly, sometimes after long periods in the last five years. She related to Dr Lim a history of how her daughter had been hospitalized and then succumbed to her injuries, and how she had been at her daughter's bedside throughout and the traumatic effect the entire experience had on her.

Dr Lim diagnosed her to be suffering from post-traumatic stress disorder and pathological grief. Dr Lim was of the opinion that the plaintiff suffered from a mood disorder, a depressive illness secondary to grief arising out of the circumstances surrounding her daughter's death, in particular, whether her daughter had a brain tumour and whether the operation had been necessary. Her tendency to preserve her daughter's room at home and desk in the office was known as 'mummification' and was a symptom of a severe grief reaction. Dr Lim was of the opinion that the plaintiff had become a psychiatric patient. He also referred to medical reports of the other doctors.

Based on the aforesaid, her Ladyship awarded S$30,000 for nervous shock. It can be seen that a sum of S$30,000 was given for the very severe psychiatric illness sustained by the plaintiff for over seven years and in the opinion of her psychiatrist, Dr Lim, the plaintiff had become a 'psychiatric patient'. So, this case is not a good comparable for the award of damages. SP1 has stated that from the time of his wife's death up to the date of trial, he has not been demoted and that he has been getting his annual salary increament for three years. SP1 has also said that from the time of the deceased's death he has not been warded in any hospital.

SP3 was cross examined as follows:

Q: You have also stated in examination in chief that En Jub'il may experience post traumatic stress disorder in the future if he experiences some family tragedy?

A: Yes.

Q: This is totally speculative?

A: I think may. (sic)

Q: Which means yes?

A: Yes.

From the evidence of SP3, it is clear that there is no possibility that the first plaintiff would suffer post traumatic stress disorder in the future. SP3 has also stated that he did not certify that SP1 was unfit to work. And he has no

reason to ward SP1 in hospital. Further, SP3 in his report (exh P2) stated '… There is no psychotic symptoms, no hallucination. No cognitive deficit. Physically no abnormality detected.'

In examination in chief, SP4 has testified as follows:

S: Selepas menjalankan rawatan kaunseling selama tujuh sesi, apakah hasil dari rawatan ini? Adakah pesakit pulih sepenuhnya?

J: Selepas menjalani perkhidmatan kaunseling sebanyak tujuh sesi, klien menunjukkan perubahan-perubahan seperti berikut: hubungan dalam keluarga dan tempat kerja bertambah baik, klien dapat menjalankan tugas dengan berkesan, perasaan murung yang berkurangan. Perasaan bimbang dan takut dapat dikawal. Bertenaga dan fikiran bercelaru berkurangan.

S: Pada pandangan Dato', adakah pesakit ini pulih sepenuh dari psikologi beliau?

J: Pada masa itu tahap kepulihan beliau ialah mampu untuk menjalankan tugas. Kebolehan berhubung dalam keluarga dan mampu mengawal perasaan.

So, from the evidence of SP1, SP3 and SP4, it is clear that SP1 has recovered fully and is not suffering from any psychological illness at present. SP1 is able to perform his work properly. So, for the chronic post traumatic stress disorder suffered by SP1 (the first plaintiff) from 20 November 1997 till 21 May 1998, I award the sum of RM5,000 for nervous shock. In *Zainab*'s case the condition of the plaintiff there was more severe as compared to our case.

Juwairiyah bte Jaafar (SP5) has testified in examination in chief that she was working as a counsellor at the Public Services Department attached at the Psychological Services Division from 2 September 1995 to 16 May 2000. She has a Bachelor of Science in Psychology and a Biology degree and Master of Arts in Psychology.

On 20 June 1998, she attended a patient by the name of Mohammad Ashraf Shub'li bin Jub'il (the second plaintiff). She did carry out counselling sessions on the second plaintiff. She prepared two reports, one in counselling (exh P1F) and one is a psychological test report (exh P1G). SP5 has stated that the second plaintiff still has traces of feeling insecure, in need of attention, acting out once in a while and fear of abandonment or losing his father.

In cross examination, SP5 agreed that she has no medical degree. She specializes in counselling and abnormal psychology. Abnormal psychology is providing treatment that is not medical to clients that have abnormal problems such as depression, at the same time as they are being treated by a psychiatrist.

The second plaintiff was not referred to her by a medical doctor but by his father. She has no personal knowledge as to the eating situation of the second plaintiff prior to his first session with her. Prior to 20 June 1998, she had no direct personal knowledge of the second plaintiff's intellectual

ability. SP5 also stated that on the first session on 5 September 1998, the second plaintiff showed further progress and improvement. In June 1998, she has less than three years' experience. SP5 also stated that she was not able to ascertain the second plaintiff's conduct and performance in school from his teacher or headmaster. Prior to her meeting with the second plaintiff in June 1998, she had no other knowledge of his emotional or psychological state, conduct or behaviour besides what his father told her. SP5 agreed that she said that the second plaintiff was socially withdrawn and inactive and feeling insecure.

Further, I find that SP5 is not an expert in child psychology as she has no medical degree. Also SP5 is not a clinical psychologist. I am of the view that from the evidence of SP5 and the contents of her report (exh P1F and exh P1G) does not show that the second plaintiff is suffering from a psychiatric illness. As such, I disallow the claim of nervous shock by the second plaintiff.

The first plaintiff is entitled to claim, as damages for bereavement under s 7(3A) read with s 7(3B)(a) of the Act, the sum of RM10,000. I make an order accordingly.

I shall then deal with the claim for special damages.

It is trite law that special damages must be specifically pleaded and strictly proved (see the case of *Ngooi Ku Siong & Anor v Aidi Abdullah*).

SP1 has testified that he bought susu segar at RM99 per month for two years, amounting to RM2,376 to overcome his difficulty in sleeping.

In the case of *Yeap Ching Hock v Kajima-Taisei Joint Venture* [1973] 1 MLJ 230, his Lordship Syed Agil Barakhbah (as he then was) at pp 235–236 said:

> With regard to special damages, most of the items quoted under the particulars, other than those deleted by the plaintiff's counsel, are agreed upon by the defendants' counsel, except for the following:
>
> (1) Purchase of fruits, Brand's essence of chicken, jinseng herbs, etc for the plaintiff.
>
> (2) The air passage from Kuala Lumpur to London and back and expenses incurred there.
>
> (3) The cost of a new artificial limb.
>
> (1) The general principle is that the plaintiff must be prepared to prove his special damages unless it has been agreed. It is not enough for him to write down the particulars and leave them for the court to decide. It is for him to prove them (see *Sum Kum v Devaki Nair & Anor* [1964] MLJ 74, 75 and *Khoo See Moi v Tay Teik Chang* [1970] 2 MLJ 249 at p 250). No doubt, the plaintiff gave evidence that he had purchased the extra nourishing food when he was in the hospital, but in the absence of medical evidence that they were necessary in the light of hospital food and nourishment prescribed, I am not prepared in the circumstances to allow the claim on the three items.

In our case, there is no medical evidence to show that it was necessary

for SP1 to consume susu segar. As such, I disallow the claim of RM2,376 for the costs of susu segar.

SP1 has stated that he is claiming the cost of purchase of mineral water at RM17.60 per month and still continuing. And in the plaintiffs' submission they are claiming the amount of RM422.40.

In cross examination, SP1 was asked as follows:

S: Item 7, bukan air mawar tetapi air mineral?

J: Ya.

S: Adakah En Jub'il apa-apa dokumen untuk bukti tuntutan ini?

J: Tidak ada.

S: Adakah ini wajib dalam agama Islam untuk menyiram air mineral di kubur tiap-tiap minggu dengan berterusan?

J: Digalakkan.

S: Adakah ini wajib dalam agama Islam di mana air mineral mesti dipakai?

J: Tidak.

S: Kalau kamu boleh pakai air paip tak payah pakai air Evian atau apa-apa air brand air mineral?

J: Tidak diminta dalam agama Islam untuk menggunakan air mineral.

S: Kegunaan air mineral adalah kehendak sendiri.

J: Ya.

I agree with the contention of the defendant that the usage of mineral water was done on SP1's own volition, and that Muslim law does not make it obligatory to do so. I am of the view that there is no basis for this claim and I thus disallow this item.

SP1 has also testified that he is claiming the costs of flowers at RM40 per month to visit the grave since the death and still continuing. He is also claiming travelling expenses at RM20 per month for visits to the grave. He visits the grave of his wife twice a week. In cross examination, he was asked as follows:

S: Adakah ini wajib dalam agama Islam untuk meletakkan bunga di kubur tiap-tiap minggu secara berterusan.

J: Tidak.

And in respect of the claim for travelling expenses he was asked as follows:

S: Item k dalam agama Islam adakah dikatakan dalam Al-Quran kamu mesti ziarah kubur minggu-minggu?

J: Ziarah kubur ia, dalam Al-Quran tidak menyebut ziarah setiap minggu.

S: Ziarah kubur berminggu-minggu ini adalah kehendak sendiri?

J: Ya.

I am of the view that the placing of flowers by SP1 at the grave of his wife was done on his own volition, and that Muslim law does not make it obligatory to do so as admitted by SP1 himself.

I agree with the contention of the defendant that the costs of travelling expenses of SP1 to the grave of his wife and the costs of flowers placed at the grave cannot be claimed as these claims would come under the ambit of the claim for bereavement.

As such, I disallow the claim of RM960 for the costs of flowers and the travelling expenses of RM460 for visiting the grave of his wife. Since the defendant has conceded to the sum of RM195 as travelling expenses for seeking specialist medical treatment, I therefore award the plaintiffs this sum of RM195.

In respect of funeral expenses, SP1 stated in examination in chief as follows:

S: Boleh kamu beritahu mahkamah butir-butir tuntutan kamu?

J: Satu belanja pengebumian RM5,000.

S: Boleh menjelaskan RM5,000 untuk apa?

J: Kenduri arwah sebanyak lebih kurang sepuluh kali dan juga kenduri dibawa ke masjid pada malam Jumaat sekurang-kurangnya sekali sebulan.

And in cross examination, SP1 was asked as follows:

S: BP muka surat 11 ditunjukkan kepada saksi. perenggan 19 item (a) belanja pengkebumian sebanyak RM5,000 adakah dokumen-dokumen bukti?

J: Tidak ada.

S: Masa pemeriksaan utama, kamu telah mengatakan kamu belanja RM5,000 untuk kenduri, betul?

J: Betul.

S: Berapa kenduri?

J: Kenduri arwah dalam Islam adalah pada hari pertama, kedua, ketiga, ketujuh, keempat puluh dan ke seratus. Dan di antara hari-hari tersebut ataupun selepasnya kita digalakkan membuat kenduri. Bilangannya adalah lebih kurang sepuluh ataupun lebih.

S: Perbelanjaan-perbelanjaan semua kenduri itu bukan perbelanjaan pengebumian pada hari pengebumian?

J: Ya.

In re-examination, SP1 was asked as follows:

S: Kamu juga ditanya peguam defendan berkaitan belanja pengebumian RM5,000 dan kamu ada beritahu ia juga untuk belanja kenduri. Boleh kamu jelaskan ini kenduri siapa?

J: Ini adalah kenduri untuk si mati.

S: Adakah kenduri perlu?

J: Islam menggalakkan kenduri untuk si mati dan ia adalah perlu.

S: Kamu kata kamu tidak ada dokumen untuk perbelanjaan ini. Kenapa?

J: Persiapan untuk kenduri dan barang-barangnya tidak diberi resit dan tidak disimpan sekiranya ada.

S: Belanja pengebumian kenapa tidak ada resit? A

J: Tidak diberi resit.

From the evidence of SP1, it is clear that he has not furnished any particulars how he spent RM5,000 as funeral expenses. No receipts were tendered to substantiate this claim. The plaintiffs did not call any relatives or family members to testify as to what expenses were incurred for the funeral arrangements. Neither has the plaintiffs called any witnesses to testify as to the normal expenses incurred in a Muslim funeral. B

I agree with the contention of the learned counsel for the defendant that the plaintiffs have not specifically proven the expense of RM5,000 as funeral expenses. However, the learned counsel for the defendant conceded that a sum of RM2,000 is reasonable for funeral expenses even though the plaintiffs have completely failed to provide evidence or proof in support of their claim. C

I am of the view that funeral expenses are normally incurred in a Muslim funeral. As such, I award the sum of RM2,000 as funeral expenses. SP1 has testified in cross examination he is claiming the sum of RM20 for the death certificate, RM80 for the post mortem report and RM5 for the police report. SP1 was not cross examined at all. Even though no receipts were produced, I award the plaintiffs RM20 for the death certificate, RM80 for the post mortem report and RM5 for the police report. D E

In summary, I award the following sums to the plaintiffs:

	General damages		
(1)	Dependency claim	RM	74,400
(2)	Tuition fees for children	RM	10,800
(3)	Fees for Al-Quran classes	RM	5,760
(4)	Laundry	RM	3,840
(5)	Cost of employing servant to look after the children	RM	19,200
(6)	Nervous shock for first plaintiff	RM	5,000
(7)	Bereavement	RM	10,000
		RM	129,000

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	Special damages		
(1)	Funeral expenses	RM	2,000
(2)	Death certificate	RM	20
(3)	Post mortem report	RM	80
(4)	Police report	RM	195
(5)	Travelling expenses	RM	5
		RM	2,300

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Total (General damages plus special damages) RM131,300.

General damages shall carry interest at 6%pa from the date of service of the writ till the date of judgment, and thereafter at 8%pa till realization.

Special damages will attract interest at 4%pa from the date of service to the date of judgment, and thereafter at 8%pa till realization.

Lastly, the defendant shall pay costs to the plaintiffs.

Order accordingly.

Reported by Jafisah Jaafar